

January 23, 2006

Civil Division-Kent County (739-7641)

Mr. David August
P.O. Box 675
Clayton, DE 19938

Re: **Freedom of Information Act Complaint
Against Town of Smyrna**

Dear Mr. August:

Our Office received your Freedom of Information Act ("FOIA") complaint on December 8, 2005. You allege that members of the Smyrna Town Council ("the Council" or "the Town") violated FOIA by meeting on November 28, 2005 without notice to the public "to discuss amending the Town Charter of the Town of Smyrna." You further allege that "[t]here have also been numerous other secret meetings but I do not have the dates."

By letter dated December 15, 2005, we asked the Town to respond to your complaint by December 28, 2005 (taking into account the Christmas holiday). We granted an extension of time because of the Town Solicitor's personal vacation plans. We received the Town's response on January 6, 2006. We received additional information from the Town by facsimile on January 11, 2005.

You allege that the following people attended a meeting on November 28, 2005: “Councilman Chervenak, Councilman Pat Cahill, Town of Smyrna Manager Dave Hugg, State Representative Bruce Ennis and former candidate for Town of Smyrna Mayor Gene Mullins. Councilman Rick Burritt may also have been in attendance. . . . I also believe that former councilman Len Rippa, former councilwoman Pat Stobaugh, former Police Captain Howard Fortner, former Secretary of Public Health Tom Eichler and former candidate for town council Valerie White were also in attendance or had prior knowledge of the secret meeting.”

According to the Town, “[t]he Smyrna Town Council consists of seven (7) Council members and a quorum of the Council consists of four (4) members.” The members of the Council are: Mayor Mark Schaeffer; Vice Mayor William Hill; Douglas Chervenak; Pat Cahill; Rick Burritt; William Pressley; and Memphis Evans. According to the Town, only two members of the Council (Chervenak and Cahill) attended a gathering on November 28, 2005 at 7:00 p.m. at Councilman Chervenak’s office along with a number of private citizens calling themselves “Citizens for Ethical Government.” That group is working for a Town charter change to allow for the recall of any elected official who violates the charter.

The Town contends that this gathering was not a “public meeting” as defined by FOIA because a quorum (four) of the members of the Town Council did not attend. The Town also contends that the two members of the Town Council who did attend the gathering were not a “subcommittee” or “ad hoc committee” appointed by the Council subject to the open meeting law.

Relevant Statutes

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those” authorized by statute for executive session. 29 *Del. C.* §10004(a).

FOIA defines a “public body” to include any “committee, ad hoc committee, special committee, temporary committee, [or] subcommittee, . . . established . . . or appointed by any body or public official of the State” *Id.* §10002(a).

FOIA defines a “meeting” as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.” *Id.* §10002(e).

Legal Analysis

You allege that, in addition to the gathering at Councilman Chervenak’s office on November 28, 2005, “[t]here have also been numerous other secret meetings but I do not have the dates.” We have previously determined that “FOIA does not place the burden on a public body to prove that a meeting did not in fact take place.” *Att’y Gen. Op.* 05-IB10 (Apr. 11, 2005). A complainant “‘must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of going forward.’” *Id.* (quoting *Gavin v. City of Cascade*, 500 N.W.2d 729, 732 (Iowa App. 1993)).

You have not provided us with any information to establish a *prima facie* case that members of the Smyrna Town Council may have met in violation of the open meeting law, other than the gathering at Councilman Chervenak’s office on November 28, 2005. Accordingly, our opinion will address only the November 28, 2005 gathering.

There is some dispute between you and the Town as to who attended the gathering on November 28, 2005. You allege that the Town Manager, Dave Hugg, and Councilman Burritt

attended, but the Town denies that either attended. For purposes of our legal analysis, it does not make any difference if either or both of them attended because the Town Manager is not a member of the Council, and even if Councilman Burritt attended there still was not a quorum of the Council in attendance at the November 28, 2005 gathering.

Our Office has issued several opinions on the application of the open meeting law to gatherings of persons from different organizations. “Such a hybrid body may be looked at two ways. Each delegation from any one public body may constitute a ‘committee’ of that public body triggering the open meeting requirements of FOIA. Or, the collective joint body may be a type of public body contemplated by the statute.” *Att’y Gen. Op.* 02-IB19 (Aug. 19, 2002).

In *Att’y Gen. Op.* 99-IB15 (Dec. 9, 1999), the city scheduled a meeting with the successful bidder to discuss technical details of a parking contract. Those in attendance were: representatives of the engineering consultant awarded the contract; a member of the Delaware Transit Corporation; the chairman of the city parking committee; the city’s assistant administrator, planning director, and assistant planning director; and representatives from a regional transportation council.

When presented with a joint meeting of this kind, we engage in a two-step analysis: (1) Whether this group of individuals from “different organizations amounted to a ‘public body’ for purposes of FOIA; and (2) if not, whether the four representatives from the City who were present at that meeting constituted an ‘ad hoc’ or ‘subcommittee’ of the City.” *Att’y Gen. Op.* 99-IB15 (Dec. 9, 1999). In *Att’y Gen. Op.* 99-IB15, we determined that the joint meeting was not “the kind of a ‘public body’ that is controlled by FOIA. Comprised of individuals from four different organizations, the group as a whole cannot be viewed as a single statutory body, as contemplated by the open meeting law. It is important to note that the City’s representatives were City employees,

not members of the Council. As employees fulfilling the duties of their employment, they do not constitute an ad hoc committee or subcommittee of the City that would require a finding that they constitute a public body as that term is defined in 29 *Del. C.* §10002(a).”

For similar reasons, we determine that the individuals who gathered at Councilman Chervenak’s office on November 28, 2005 -- two current Council members, a State legislator, a former Cabinet Secretary, and former Town office-holders or candidates for office – as a group cannot be viewed as a single body subject to the open meeting law.¹ We then must determine whether the two members of the Town Council who attended were acting as a “subcommittee” or “ad hoc committee” of the Town Council.

The Town takes the position that the open meeting law applies only when a quorum of a public body meets to discuss public business. It is true that FOIA defines a “public meeting” as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.” 29 *Del. C.* §10002(e). But FOIA also defines a public body to include a “committee,” “subcommittee,” or “ad hoc committee” which is “established” or “appointed” by any public body. *Id.* §10002(a).

These two sections of the statute are not inconsistent. For example, there are seven members of the Town Council so under FOIA there is a “public meeting” of the council when at least four members are present. *See* 29 *Del. C.* §10002(e). FOIA, however, also includes within the definition

¹ Under certain circumstances, representatives from different organizations – as a group – may become a public body under FOIA if they are all government officials or employees who meet regularly to discuss matters of public business and there is “a high degree of connexity between the topics of discussion” at the joint meetings and discussion of the same matters at later meetings of the individual organizations. *See Att’y Gen. Op.* 02-IB19 (Aug. 22, 2002).

of a “public body” any “committee,” subcommittee,” or “ad hoc committee” which is “established” or “appointed” by the Town Council. If the Town Council appoints a committee of three members, then a meeting of a quorum (two members) of the committee is a public body subject to FOIA. In this way, a meeting by less than a quorum of the public body may be subject to the open meeting laws. *See Att’y Gen. Op.* 02-IB33 (Dec. 23, 2002) (town council established a review planning committee consisting of three council members; when two members (a quorum) of the committee met to discuss a conditional use application without notice to the public, they violated FOIA).

The Town has provided us with a sworn affidavit of David Hugg, III, the Town Manager since June 2002. According to that affidavit, Mr. Hugg “is not aware . . . of any committee, subcommittee, board, panel, etc. formed, created, or appointed by the town Council or the Mayor (or any number of members sufficient to form a quorum thereof)” to attend the Gathering of the Citizens for Ethical Government on November 28th, 2005.

There is no evidence in the record to suggest that the Town Council appointed or established Councilmen Chervenak and Cahill as a committee of the Council. *Compare with Att’y Gen. Op.* 02-IB33 (by motion and vote, the town council established a review planning committee consisting of three council members). Based on the evidence in the record, we determine that the Town Council did not establish or appoint Councilmen Chervenak and Cahill as a committee, subcommittee, or ad hoc committee of the Council to attend the gathering of Citizens for Ethical Government on the evening of November 28, 2005.²

² Like Delaware’s FOIA, the application of the open meeting laws in many other states may turn on whether a quorum of the members of a public body met to discuss public business. Some courts have held that the open meeting laws nevertheless apply to meetings of less-than-a-quorum of the public body. *See Booth Newspapers, Inc. v. Board of Regents of the*

Conclusion

For the foregoing reasons, we determine that the Town did not violate the open meeting requirements of FOIA when two members of the Town Council attended a gathering of Citizens for Ethical Government on November 28, 2005 to discuss a change in the Town charter. The group as a whole cannot be viewed as a single body for purposes of the open meeting law, and there is no evidence in the record that the two Council members who attended the gathering were established or appointed by the Town Council as a committee, subcommittee, or ad hoc committee of the Council.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

Lawrence W. Lewis, Esquire
State Solicitor

cc: The Honorable Carl C. Danberg

University of Michigan, 507 N.W.2d 422 (Mich. 1993); *Moberg v. Independent School District No. 281*, 336 N.W. 2d 510 (Minn. 1983) ("serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending on the facts of the individual case"). For purposes of this opinion, we do not have to delve into that controversial legal thicket because, unlike in those cases, there is no evidence in the record that the Town Council met in a series of subquorum groups to avoid the application of Delaware's FOIA.

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